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Supreme Court, U.S.
FILED

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NO. _____

In the
Supreme Court of the United States

January Term 1999

Mutaz A. Mohammed
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. THE FINDINGS OF THE TRIAL COURT CONSTITUTE AN ABUSE OF DISCRETION AND VIOLATE THE DEFENDANT'S RIGHT TO DUE PROCESS.

B. DEFENDANT WHO REFUSES TO GIVE INFORMATION TO A PROBATION OFFICER FOR THE PURPOSE OF PREPARING A PRE-SENTENCE INVESTIGATION REPORT CANNOT BE ENHANCED FOR OBSTRUCTION UNDER § 3C 1.1, Federal Sentencing Guideline.

C. A DEFENDANT CANNOT BE ENHANCED FOR DISRUPTIVE BEHAVIOR WHILE AWAITING SENTENCING AFTER CONVICTION UNDER § 3C 1.1, AND ALSO BE ENHANCED FOR THE EXACT SAME CONDUCT AS UNDER-REPORTED CRIMINAL HISTORY, § 4A1.3.

LIST OF PARTIES

Pursuant to Sup. Ct. R. 14(b), the Petitioner submits the following list of parties to the proceedings below :

Mutaz Abdel Mohammed, Defendant

United States of America, Plaintiff

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C. A DEFENDANT CANNOT BE ENHANCED FOR DISRUPTIVE BEHAVIOR WHILE AWAITING SENTENCING AFTER CONVICTION UND ER § 3C1.1, AND ALSO BE ENHANCED FOR THE EXACT SAME CONDUCT AS UNDER-REPORTED CRIMINAL HISTORY, § 4A1.3.

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The opinion of the Court of the United States Court of Appeals is reproduced herein at Appendix A.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The District Court of the United States for the Middle District of North Carolina has original exclusive jurisdiction of all offenses against the laws of the United States pursuant to 18 U.S.C. § 3231. The Defendant was charged with a violation of 18 U.S.C. § 844(i). The United States Court of Appeals for the Fourth Circuit had jurisdiction to hear Defendant's appeal pursuant to 18 U.S.C. § 3732 and 18 U.S.C. § 37.42.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the Constitution of the United States of America, provides as follows:

> The Due Process Clause of the Fifth Amendment to the Constitution of the United States, se means that no person shall be deprived of life, liberty, property, or of any right granted by statute unless matter involved first shall have been adjudicated against him upon trial conducted according to established rules regulating judicial proceedings. Due process of law implies the right of the person affected thereby to be present before the tribunal which

> pronounces judgment upon the question of life, liberty or property in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law.

U.S. Constitution - 5th Amendment "... No person... shall be deprived of life, liberty, or property without due process of law."

U.S. Constitution - 14th Amendment, Sec. 1: ..."No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Clearly, in this instance, your Applicant has been deprived of due process of law.

STATEMENT OF THE CASE

This is a federal criminal case involving the departure from the guideline range due to Defendant's failure to give information to the probation officer, and that his conduct while awaiting sentencing, did not justify a departure under either U.S. Sentencing Guidelines Manual § 5K2.0 or § 4A1,3 (1997).

Defendant Mohammed was sentenced to 150 months for destruction of a building by fire. The Defendant filed an appeal from his 150 month sentence for destruction of a building.

The Defendant was charged in a single count indictment on August 25, 1997, by a federal grand jury for the Middle District of North Carolina for destruction of a building by fire. The incident occurred on March 31, 1997 in Winston-Salem, North Carolina. The building was used in interstate and foreign commerce. The offense was in violation of 18 U.S.C. § 844(i).

The Defendant was taken into custody on August 25, 1997 and detained. A jury trial was held on October 28, 1997, and Defendant was found guilty by the jury on October 30, 1997, before the Honorable William L. Osteen, Sr.

The Defendant appeared for sentencing on December 22, 1997, before Judge Osteen, Sr., and was sentenced to 150 months, restitution of $14,200.00 to the victims, and a special assessment of $100.00. The Defendant entered Notice of Appeal on December 23, 1997, to the United States Court of Appeals for the Fourth Circuit. On January 25, 1999, the Court rendered its Opinion, found no error, and affirmed Defendant Mohammed's sentence. Appendix A.

REASON FOR GRANTING THE WRIT

A. THE FINDINGS OF THE TRIAL COURT CONSTITUTE AN ABUSE OF DISCRETION AND VIOLATE THE DEFENDANTS' RIGHT TO DUE PROCESS.

B. DEFENDANT WHO REFUSES TO GIVE INFORMATION TO A PROBATION OFFICER FOR THE PURPOSE OF PREPARING A PRE-SENTENCE INVESTIGATION REPORT CANNOT BE ENHANCED FOR OBSTRUCTION UNDER § 3C1.1, FEDERAL SENTENCING GUIDELINE.

C. A DEFENDANT CANNOT BE ENHANCED FOR DISRUPTIVE BEHAVIOR WHILE AWAITING SENTENCING AFTER CONVICTION UNDER § 3C1.1, AND ALSO BE ENHANCED FOR THE EXACT SAME CONDUCT AS UNDER-REPORTED CRIMINAL HISTORY, § 4A1.3.

The standard is for the appellate Court to view all the evidence without the prism of "in the light most favorable to the prosecution", and set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust

The Defendant was the prior owner of a convenience store that was alleged to have been intentionally burned down. Defendant's brother was the owner at the time of the fire. The building was completely destroyed by fire. The fire was investigated by the United States Department of Alcohol, Tobacco and Firearms, and the North Carolina State Bureau. After the investigators determined that the fire had been intentionally set, circumstantial evidence was gathered and the Defendant was charged with a federal crime under the United States Code. There was no eye witness to the crime. Defendant claimed that he did not set the fire, but drove by and saw the building on fire, but did not report the fire because he was afraid he would be blamed. Defendant's vehicle was observed by a Winston Salem Police Officer, who allegedly knew the vehicle belonged to the Defendant, parked unoccupied near the vicinity of the fire, and just prior to the fire. The Defendant sought medical treatment for burns on the same day as the fire. Defendant reported that he had been burned while lighting a kerosene heater. Defendant used a fictitious name at the hospital.

The Defendant then left the State of North Carolina for a month. Defendant gave statements to investigators and testified at trial that he did not set the fire. After the jury came

back with a guilty verdict, the Defendant was detained pending a sentencing hearing. Defendant's jailers allege that Defendant destroyed jail property, engaged in self destructive behavior, spit on his jailers, refused to abide by the jail rules and regulations, threatened and cursed jailers, refused to eat, refused to give information to a federal probation officer regarding pre-sentence investigation report, and refused to communicate with his attorney regarding sentencing.

When Defendant was brought before the Court for sentencing, he was brought to Court wearing a gag because of his alleged spitting. When the Court asked questions of the Defendant and his gag was removed, Defendant used obscene and profane language to the Court. Defendant was also restrained in his chair in Court. During the sentence hearing, the Court enhanced the Defendant for his behavior while awaiting his sentencing hearing by incrementally increasing the criminal history category from three (3) to a criminal history category of six (6), and an offense level twenty-six (26).

The Court erred when it misapplied the Federal Sentence Guidelines by double counting the obstruction and under-reported criminal activities, when both were the identical behavior and Defendant's sentence was increased to 150 months as a result.

The Court also erred when it charged two (2) points for obstruction for refusing to talk to the probation officer when the Federal Sentencing Guidelines clearly state that Defendant has a constitutional right to refuse to give information to a probation officer for purposes of a pre-sentence report.

The Court further erred when it used Defendant's conduct in jail while awaiting sentence, as obstruction, because Defendant's conduct does not meet the definition of obstruction and charged Defendant with another two (2) points. The Court also used Defendant's conduct in jail while awaiting sentencing

to further enhance the charge of arson by stating the Defendant's jail conduct was under-reported criminal activity; adding another four (4) points to Defendant's level when the Defendant's conduct in jail was in no way similar to the crime of arson

The Defendant was sentenced to one hundred fifty (150) months, when in fact the Defendant's sentencing should have been seventy-eight (78) to ninety-seven (97) months.

ISSUE A:

ENHANCEMENT of Defendant's sentence based on the Court's finding of fact that the Defendant obstructed, when he refused to be interviewed by the probation officer for pre-trial sentencing report should be reviewed on a clearly erroneous factual basis and a de novo legal basis. United States v. Singh, 54 F.3d 1182, 1190 (4th Cir. 1995).

ISSUE B

ENHANCEMENT of Defendant's sentence based on the Court's finding of fact that Defendant's past conviction behavior was obstruction, and under reported criminal activity should be reviewed on a clearly erroneous factual basis and a *de novo* legal basis. United States v. Singh, Supra.

During the sentencing hearing, the Court enhanced the Defendant incrementally from criminal history of three, offense level of 26 to a criminal history of six, offense level 26.

At the sentencing hearing, Defendant objected to the enhancement.

The Court found that the Defendant refused to give information to the probation officer to aid in preparing a Pre-Sentence Report. The Defendant did not give false information,

nor did he give misleading information to the probation officer who was preparing the report. The Defendant exercised his Constitutional Right by not giving any information.

The United States Sentencing Commission's Guideline Manual §3C1.1 (1997), Obstructing or Impeding the Administrative of Justice sets out what constitutes a violation for the purpose of enhancement. The Commentary, Application Notes, 1, says ....:"This provision is not intended to punish a Defendant for the exercise of a constitutional right. A Defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision." U.S.S.G. §3C1.1(1).

The United States Sentencing Commission Guidelines Manual §1B1.7 (1997) Significance of Commentary, explains that a commentary explains or interprets how a guideline is to be applied, and failure to follow such commentary could constitute an incorrect application of the guideline, U.S.S.G. §1B1.7.

In Stinson v. United States, 113 S.Ct. 1913 (U.S. 1993), the Petitioner had been convicted as an ex-felon in possession of a firearm and sentenced as a career offender under the 1989 United States Sentencing Guideline Manual. Amendment 433 changed the commentary to §4B1.2, to give a definition that a crime of violence does not include unlawful possession of a firearm by a felon. The Court of Appeals would not consider the commentary as binding, but only persuasive. The Supreme Court reversed the finding, and held that with limited exception, guideline commentary is authorative.

In United States v. Shirk, 981 F.2d 1382 (3rd Cir. 1992), states that.."Commentary is an intrigued guide to the guidelines and an accurate reflection of the Commission's intent."

The Pre-Sentence Investigative Report, which is under seal and prepared by a Probation Officer, makes reference to the Defendant refusing to be interviewed for the report. The Probation Officer did not seek an enhancement, because the Defendant refused the interview. The only enhancement under item 15 is for two (2) points. Obstruction of Justice, perjury at trial under oath. The probation officer did not testify at the sentencing hearing.

The Court believes that the Court's misapplication of the guidelines to enhance the Defendant for failure to give an interview to the probation officer, is a clear error, and the Court should not have used § 5K2.0 to go outside of the guidelines for an enhancement.

The Court further held that the Defendant should be enhanced for his conduct while being detained, after the conviction and while awaiting sentencing. The District Court has not shown an extraordinary circumstance that would give to a departure and the Defendant believes that the sentencing Court must do so to go outside the guidelines. The Court had ordered a longer sentence than was authorized by the guidelines, and therefore, the sentence is outside the guidelines.

The Defendant was housed at several different Sheriff's Detention Centers while awaiting sentencing. They included Guildford County Sheriff's Department, Forsythe County Sheriff's Department, and Randolph County Sheriff's Department.

Testimony by a jailer from Guildford County concerning the conduct of the Defendant was that the Defendant damaged a sprinkler head, a ceiling tile, refused to drink on several occasions, refused to eat on several occasions, and refused recreation.

No charges were filed against the Defendant, but he was given seven days of disciplinary action for destruction of property. There is not an explanation as to what the disciplinary action was in the transcript.

While the Defendant was at Forsyth County detention Center, he damaged sleeping mattresses, broke a broom, a wall thermometer, and damaged a water fountain. The defendant was cited in 52 reports. No charges were filed against him and he had four disciplinary in house procedures and was found guilty and lost his canteen privileges and other privileges.

At Randolph County Detention Center, the Defendant allegedly threatened a jailer in the same manner as Defendant allegedly threatened the Court during the hearing. According to the United States Marshall Carlton, the Defendant caused problems, property damage and disciplinary problems.

The Court's use of the Defendant's conduct while being detained, awaiting sentencing, for enhancement by obstructing, §3C1,1 or Adequacy of Criminal History §4A1.3. , is not only double counting ,but does not fit into the categories listed. Adequacy of Criminal History, §4A1.3. (Policy Statement) says... " A prior arrest record itself shall not be considered under §4A1.3." U.S.S.G. Manual §4A1.3.(e)(5). The Court did not make a finding of fact that the Defendant, based upon past un-reported and under-reported criminal history, posed a greater risk of recidivism. Not only did the Court count the conduct as obstructing under §3C1.1, but also under Adequacy of Criminal History §4A1.3. This appears to be double counting by the Court.

While being housed in a jail, a Defendant cannot obstruct, impede during the investigative, prosecution or sentencing, nor does it come under 18 U.S.C. §1501-1516. Refusing to eat, drink, batting your head against a wall, cursing,

yelling, disruptive behavior should not be considered criminal conduct or obstructing in a jail setting.

The Court did not enhance the Defendant for his outrageous behavior during the sentencing hearing.

In United States v. Gardner, 988 F.2d 82 (9th Cir. 1993), a District Court increased the Defendant's offense level under §3C1.1, because the Defendant had assaulted a prison guard while awaiting sentencing. The Appellate Court held that §3C1.1 contained a clear mens rea requirement and limits the obstruction of justice. The criminal activity without more, is insufficient to justify an increase to a sentence. The sentence was vacated.

The Court used the same conduct as listed above and double counted using Obstructing §3C1.1 and criminal history §4A1.3, to raise the criminal history from a level 3 to a level 6. The Court clearly erred in going outside the guidelines and sentencing the Defendant to 150 months, when Criminal History III, Offense Level 26, 78-97 months should have been used. The Court combined the obstruction and under-reported criminal history in criminal history category using the same incidents of obstruction as under-reported criminal history in criminal history category using the same incidents of obstruction and under-reported criminal history. The chargeable incidents under §4A1.3 and §3C1.1 are combined by the Court under 5K2.0, and the court did not consider this double counting.

5K2.0 Grounds for Departure (Policy Statement) discusses departure from the guidelines and says....." the Court may depart from the guidelines, even though the reason on departure is taken into consideration in the guidelines", and "if the Court determines that, in light of unusual circumstances the guideline level attached to that factor is inadequate." The "Commentary" to 5K2.0 states that ..." However, the Commission believes that such cases will be extremely rare."

The last paragraph of the Commentary goes to show an example " dissatisfaction with the available sentencing range or a preference for a different sentence that authorized by the guidelines is not appropriate basis for a sentence outside the applicable guideline range." U.S.S.G. 5K2.0.

Acts of outrage by the Defendant being encompassed under §4A1.3 to show future criminal conduct should not be considered as criminal conduct for enhancement purposes. The different sheriff's departments treated the behavior as outrageous and in two of the departments gave the Defendant "in-house disciplinary action". They took the Defendant's canteen privileges away and other privileges. The Defendant could not buy candy bars or other items sold by the Detention Center and was not able to watch television.

A third detention center charged the Defendant with misdemeanor destruction of county property. The charges were later dropped after the Defendant was convicted of the present charge of Arson.

The Defendant has enhanced two points on criminal history because he was on unsupervised probation at the time of the pre-sentence offense. The arrest record, as shown in the presentence report, are misdemeanors. The instant case is the Defendant's first felony conviction.

The totality of the criminal history, combined with his actions in the detention centers and his attitude, does not appear to fit the inadequate criminal history as the guidelines indicate.

There is little doubt that the conduct demonstrated by the Defendant at the sentencing hearing was improper and may have influenced the Court. The Defendant was not held in contempt for his language or behavior by the Court. The

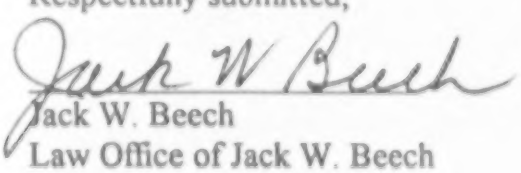
outburst by the Defendant were similar to his conduct while being detained by the various sheriff's departments.

CONCLUSION

The Court should comply with the meaning of the Commentaries of the Guidelines, and apply the guidelines which would have the Defendant guideline of 26 and a criminal history of three for a 78 to 97 month range. A totally different outcome. The Defendant is being punished by the Court for a jury conviction of arson and the Court has enhanced the sentence from 78 to 97 months to 150 months. If the Supreme Court, upon review of this case finds that the enhancement for obstruction and under-reported criminal history guidelines have been misapplied, then the case should he remanded for compliance with the guidelines that were in effect. In addition, the enhancement for under-reported criminal history does not have a relationship with the crime of arson.

The Court committed reversible error and the outcome of sentencing would have been different had the guidelines been applied as written.

Respectfully submitted,



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APPENDIX

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APPENDIX A - OPINION OF THE 4th Circuit Court of Appeals of the United States - Cause No. 98-4006

Unpublished
United States Court of Appeals
For the Fourth Circuit

United States of America
Plaintiff Appellee

IV. No. 98-4006

Mutaz Abdel Mohammed
Defendant-Appellant

Appeal from the United States District Court
for the Middle District of North Carolina, at Durham
William L. Osteen, Sr., District Judge

Submitted: December 29, 1998
Decided: January 25, 1999

Before NIEMEYER, HAMILTON and MICHAEL, Circuit Judges.

Affirmed by unpublished per Curiam opinion

COUNSEL

Carol B. Andres, Ashville, North Carolina for Appellant.

Walter C. Holton, Jr. United States Attorney, Clifton T. Barrett, Assistant United States Attorney, Greensboro, North Carolina for Appellee

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(a).

OPINION

PER CURIAM:

Mutaz Mohammed appeals from his 150 month sentence for destruction of a building by fire on the grounds that the district court improperly departed from his guideline range due to his failure to give information to the probation officer, that his destructive behavior while awaiting sentencing was impermissibly double-counted for departure purposes, and that his conduct did not justify departure under either U.S. Sentencing Guidelines Manual § 5K2.0 or §4A1.3 (1997). Finding no error, we affirm Mohammed's sentence.

A jury convicted Mohammed of intentionally burning down a convenience store which he had recently leased. The evidence at trial showed that Mohammed used an accelerant to cause an explosion and fire. Mohammed sustained burns in the ensuing blast and sought medical treatment under an alias, telling hospital staff that he sustained the injuries at home while filling a kerosene heater. Mohammed then left the Winston-Salem, North Carolina, area, for a couple of months. Upon Mohammed's return, and before he was charged with arson, he spoke with an Alcohol, Tobacco and Firearms agent. He told

the agent that he was in the store at night when he saw an intruder who set the fire. Mohammed also told this story at trial.

During Mohammed's sentencing hearing, the government supported a request that the District Court depart upward from Mohammed's guideline range based on USSG § 4A.3, by presenting substantial evidence of his destructive conduct while being held in state jails. In three state jails where he was housed, Mohamed was violent and abusive toward the facilities and his jailors. Mohamed repeatedly defaced and destroyed prison property, including ceiling tiles, mattresses, a broom, a clock, a water fountain, and a thermometer, hurled obscenities and threats of violence at prison staff, threw and smeared his food and spit at officers. In one jail alone, Mohamed had twelve reported instances of damage to property. The commander of the jail testified that but for Mohamed's status as a federal prisoner, he would have been charged with criminal offenses for each of these incidents when he destroyed property. Frequently, prison officials were forced to physically restrain Mohamed. In addition, Mohamed refused to cooperate with or speak with the probation officer assigned responsibility for preparing his presentence report.

In the presentence report, the probation officer established Mohamed's base offense level at twenty-four and then added a two point enhancement for Mohamed's obstruction of justice by committing perjury at trial. Mohamed received a total of five criminal history points, three for prior convictions and two for being on probation at the time of the offense, which gave him a criminal history category of III. At sentencing, the judge made explicit findings that Mohamed perjured himself at trial. The judge adopted the probation officer's factual findings and guideline applications. Thus, the record reflects that the sole reason Mohamed received an adjustment for obstruction of justice under the guidelines was

for perjury. His guideline range based on an offense level of 26 and criminal history category III was 78-97 months.

After adopting the presentence report, the district court then upwardly departed beyond the guideline range to offense level 26 and criminal history category VI for a range of 120-150 months. The Court found that either of two methods of departure resulted in the same guideline range. First the Court found that Mohamed's destructive conduct in the jails supported a departure under USSG § 4A1.3 because it showed that his criminal history category did not reflect the seriousness of his past criminal conduct or the likelihood that he would commit other crimes. Second, the Court found that this same conduct supported a departure under USSG § 5K2.0 for obstruction of justice. The court mentioned that it also considered Mohamed's failure to cooperate with the probation officer an obstruction of justice. The Court sentenced Mohamed at the high end of this range to 150 months imprisonment.

Mohamed first contends that the district court erroneously relied upon his failure to give information to the probation officer as a factor to support departure for obstruction of justice. We find that we need not address this contention because it is clear that the district court would have imposed the same sentence even absent its reliance upon this factor. See Koon v. United States, 518 U.S. 81, 113-14 (1996) (sentence may be affirmed notwithstanding reliance upon improper factor for departure if district court would have imposed same sentence based upon proper factors considered).

Mohamed also contends that the district court erred by considering his conduct while in jail as a basis for departing under both USSG §§ 4A1.3 and 5K2.0. We reject this contention because the district court did not "double count" this conduct. The two departure methods were not cumulative.

They were simply two different methods of arriving at the same sentencing guidelines range.

Finally, Mohamed seems to contend in an undeveloped argument that his conduct while incarcerated does not fit within USSG §4A1.3. He states simply that the guidelines prohibit the consideration of "a prior arrest record itself", under §4A1.3.. Yet, the same guideline section states that prior similar adult criminal conduct not resulting in a criminal conviction is properly considered. The conduct considered by the district court, Mohamed's destruction of property while incarcerated, is similar to the offense conduct of destroying property by fire. We therefore reject Mohamed's final argument that USSG §4A1.3 did not permit the district court to consider his conduct while incarcerated.

Accordingly, we affirm Mohamed's sentence. We deny Mohamed's motion to relieve his attorney and dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED